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August 4, 2000

Ex Parte Submission

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Ex Parte*, CC Docket No. 96-98, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; CC Docket No. 98-147, Deployment of Wireline Services Offering Advanced Telecommunications Capability

Dear Ms. Salas:

This letter provides further information regarding the obligation of incumbent LECs ("ILECs") to provide nondiscriminatory access to the unbundled network element platform ("UNE-P") for use by CLECs in providing both voice and data services over a single loop. Commission action is necessary to prevent ILECs from extending their monopoly over traditional POTS services to new advanced services in a manner that ensures that only the ILECs and their data affiliates will be able to realize the full benefits of new technology.

I. Line Splitting Using ILEC-Supplied Splitters

AT&T's petitions for reconsideration and clarification of the Commission's UNE Remand Order[1] and Line Sharing Order[2] seek, among other things, Commission action requiring ILECs to cooperate fully in enabling UNE-P CLECs to provide voice and data services over a single loop as swiftly, seamlessly, reliably, and economically as when an

[1] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order, 15 FCC Rcd 3696 (1999) ("UNE Remand Order").

[2] Deployment of Wireline Services Offering Advanced Telecommunications Capability, Third Report and Order, 14 FCC Rcd 20912 (1999) ("Line Sharing Order").

ILEC and its affiliate provide voice and data services, or when an ILEC provides voice services and a data-only CLEC provides advanced services. To this end, ILECs must provide splitters on a line-at-a-time basis to enable UNE-P carriers to offer both voice and data services over a customer's existing local loop. Although this service configuration is, in practical and technical terms, nearly identical to the "line sharing" described in the Line Sharing Order, it has come to be called "line splitting," in light of the fact that the CLEC purchases and uses the entire loop to provide both voice and data services.

In its Texas 271 Order, the Commission stated that its prior orders did not explicitly require ILECs to provide the support for line splitting that AT&T has requested.[3] The Commission found, however, that AT&T's arguments on this important issue "merit prompt and thorough consideration," and the Commission "commit[ted] to resolving them expeditiously" in the pending reconsideration of the UNE Remand Order.[4] In order to expedite the Commission's consideration of those issues, AT&T submits herewith the following materials from CC Docket Nos. 00-04 and 00-65, which provide technical, legal, and policy support for AT&T's position that ILECs must provide UNE-P CLECs with the reasonable and nondiscriminatory functionalities and processes they need, including splitters provided on a line-at-a-time basis, in order to comply with the Act and afford CLECs a meaningful opportunity to compete:

Application by SBC Communications Inc. *et al.*, for Provision of In-Region, InterLATA Services in Texas, CC Docket No. 00-65:

- Attachment 1 - Ex Parte Letter from James L. Casserly, Counsel for AT&T Corp., to Magalie Roman Salas, Secretary, Federal Communications Commission dated June 7, 2000 (legal argument at 1-12; policy considerations and need for expedited treatment at 12-14);

- Attachment 2 - Supplemental Responsive Declaration of C. Michael Pfau and Julie S. Chambers on Behalf of AT&T, dated June 7, 2000 (factual predicate for legal argument at 1-16; policy considerations and need for expedited treatment at 16-20);

- Attachment 3 - Supplemental Comments of AT&T in Opposition to SBC's Section 271 Application for Texas, dated April 26, 2000 at 10-19 (legal argument at 13-19; policy considerations and need for expedited treatment at 10-12); and

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[3] Application by SBC Communications Inc., *et al.*, Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas, CC Docket No. 00-65, FCC 00-238 (rel. June 30, 2000) ("Texas 271 Order") ¶ 328.

[4] Id.

- Attachment 4 - Supplemental Declaration of C. Michael Pfau and Julie S. Chambers on Behalf of AT&T, dated April 26, 2000 at 1-24 (factual predicate for legal argument at 8-22; policy considerations and need for expedited treatment at 22-24).

Application by SBC Communications Inc. *et al.*, for Provision of In-Region, InterLATA Services in Texas, CC Docket No. 00-04:

- Attachment 5 - Ex Parte Letter from James L. Casserly, Counsel for AT&T to Magalie Roman Salas, Secretary, Federal Communications Commission, dated March 3, 2000 (public version) (legal argument at 1-3);

- Attachment 6 - Comments of AT&T in Opposition to Southwestern Bell Telephone Company's Section 271 Application for Texas, dated January 31, 2000 (public version) at 1-5, 9-22 (factual predicate for legal argument at 9-16; legal argument at 18-22; policy considerations and need for expedited treatment at 16-18); and

- Attachment 7 - Declaration of C. Michael Pfau and Julie S. Chambers on Behalf of AT&T, dated January 31, 2000 at 1-23 (factual predicate for legal argument at 4-5, 8-9, 13-23; policy considerations and need for expedited treatment at 5-13).

The above documents provide the Commission with ample authority, both in law and policy, to adopt AT&T's position. A CLEC has a right to the full and exclusive use of the loop it purchases from the ILEC (47 C.F.R. § 51.309(c)), and is entitled to OSS functions,[5] loop conditioning,[6] and cross-connects[7] to assure that it continues to receive nondiscriminatory access to UNEs and interconnection, as required by Section 251(c). Accordingly, AT&T requests that the Commission clarify that ILECs are required to provide splitters to UNE-P CLECs (and other requesting CLECs) on a shared use, line-at-a-time basis and to implement all procedures needed to provide UNE-P CLECs wishing to offer voice and data services over a single loop with a meaningful opportunity to compete against the service packages provided by the ILECs and their affiliates.

II. Line Splitting Using CLEC-Supplied Splitters

In the event that the Commission does not agree with AT&T's view that the Act and the Commission's procompetitive policies require ILECs to provide splitters, AT&T respectfully urges that the Commission clarify the ILECs' obligations when CLECs furnish splitters for use in line splitting. Specifically, the Texas 271 Order reaffirmed that

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[5] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order (1996) ("Local Competition Order"), 11 FCC Rcd 15499, 15765-766, ¶ 520; UNE Remand Order ¶¶ 425-426.

[6] UNE Remand Order ¶¶ 172-173.

[7] Id. ¶¶ 178-179.

the Commission's existing rules "require incumbent LECs to provide requesting carriers with access to loops in a manner that allows the requesting carrier 'to provide any telecommunications service that can be offered by means of that network element.'"[8] At a minimum, therefore, "incumbent LECs have an obligation to permit competing carriers to engage in line splitting over the UNE-P where the competing carrier purchases the entire loop and provides its own splitter."[9] Moreover, the order stated that SWBT must allow CLECs to use a customer's existing loop to achieve this result.[10] The order does not, however, describe the specific processes that SWBT must offer, or that CLECs must follow, to implement this competitively vital capability. It is critical that these processes be made explicit; otherwise CLECs will not have a meaningful opportunity to compete against ILECs in offering bundles of voice and data services to end users, which has become an essential component of local competition.[11]

AT&T's concerns in this regard cover the entire range of OSS support necessary to support line splitting for UNE-P CLECs. CLECs that implement UNE-P for voice services must be assured (1) that they will have simple and easily usable ordering and provisioning processes to add DSL capabilities to their UNE loops; (2) that they will receive nondiscriminatory maintenance and repair support for their voice services after the DSL capability is added to the loop; and (3) that they will obtain sufficient data on the ILECs' performance to assure that they are receiving the required support from ILECs. In addition, ILECs must (4) provide CLECs with necessary billing information in an appropriate and useable format; (5) be prohibited from imposing unreasonable constraints upon shared collocation arrangements between voice and data CLECs; and (6) not charge excessive rates for the work they do in implementing line splitting. Finally, (7) ILECs must not be allowed to tear apart existing service arrangements, or impose a collocation requirement to combine network elements, when there is no technical need to do so. Although AT&T believes that this alternative is far less efficient than having the ILEC provide the splitter, and does not fully address the discrimination and other legal issues AT&T has raised, Attachment 8 sets forth the minimum operational requirements that are necessary if ILECs are permitted to require disassembly of existing UNE-P combinations and require the use of a CLEC-supplied splitter in a CLEC's collocation space when DSL capabilities are added to, or provided with, a UNE loop.

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8 Texas 271 Order ¶ 325 (citation omitted).

9 Id. (citation omitted).

10 Id.

11 SBC Communications, Inc., "Strong Revenue, Wireless and Data Growth Power SBC's Second-Quarter Performance," SBC News Release at 1-2 (July 20, 2000) (touting strong data and DSL service growth in the second quarter, the press release quotes SBC Chairman and CEO Edward Whitacre: "[w]e continue to execute our business plan with passion and purpose, which is to completely transform SBC and its companies into a data-centric business capable of becoming the only communications source our customers will ever need"); see also Fortune, June 12, 2000, "Why the Biggest Baby Bell Is Wild About Broadband" (Chairman Whitacre explained "[b]roadband will be indispensable, and it's going to happen pretty quickly. . . . It will be as basic as telephone service").

As an initial matter, it is important to recognize that there are no practical or technical differences in the work necessary to provide access to a loop for the purposes of supporting line sharing or line splitting, especially when the CLEC must provide the splitter. In the latter case -- just as in line sharing -- a CLEC obtains access to the DSL capability of an existing loop by having the ILEC (1) cross-connect the customer's loop to a collocation that contains a splitter and (2) cross-connect the voice output from the splitter to the switch port on the ILEC circuit switch. In both cases, voice service is provided using the ILEC's loop, switching, signaling, and transport elements. Moreover, in both cases the DSL service is offered by a carrier that has obtained access to the high frequency spectrum ("HFS") of an ILEC loop and provides to itself or obtains from a third party packet switching functionality. In fact, the only significant difference between line sharing and this type of line splitting is the identity of the carrier providing voice service to the end user customer – a competitively important but functionally meaningless distinction.

From a functional standpoint, the Commission has consistently defined an unbundled network element as including "all of [its] features, functions, and capabilities, in a manner that allows the requesting telecommunications carrier to provide any telecommunications service that can be offered by means of that element."[12] There can be no dispute that the purpose of providing access to a loop's HFS is identical in both line sharing and line splitting: HFS access is a sine qua non to provide data services to end users. Thus, there is no basis to apply different rules to CLECs' ability to obtain access to HFS, regardless of whether the HFS will be used in a line sharing or line splitting arrangement.

From a legal standpoint, the Commission has also consistently interpreted Section 251(c)(3) to require that competitive carriers' access to unbundled network elements must be nondiscriminatory in two directions. First, all CLECs are entitled to nondiscriminatory access to UNEs measured against the ILEC's (or its affiliate's) access to such elements. In cases where there is no reasonable ILEC analog, CLECs are entitled to access that provides them a "meaningful opportunity to compete."[13] Second, all

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[12] 47 C.F.R. § 51.307(c) (emphasis added); see also Local Competition Order ¶ 382 ("some modification of incumbent LEC facilities" is required by § 251(c)(3)); Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York, CC Docket No. 99-295, FCC 99-404, (rel. December 22, 1999)("New York 271 Order") ¶ 271 (an ILEC "must also provide access to any functionality of the loop requested by a competing carrier unless it is not technically feasible"); 47 C.F.R. § 51.309(a) (an ILEC may not impose "limitations, restrictions, or requirements on requests for, or the use of unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends").

[13] Local Competition Order ¶ 312. The Commission has stated that the "meaningful opportunity to compete" standard is not intended to be a weaker test than the "substantially the same time and manner" standard. New York 271 Order ¶ 45. Rather it serves as a proxy for whether access is being provided in substantially the same time and manner" and, thus, nondiscriminatory. Id.

CLECs are entitled to nondiscriminatory treatment vis-à-vis each other.[14] Furthermore, Section 251(c)(3) requires that access to network elements must be subject to just and reasonable terms and conditions.[15] Given the technical and functional equivalence of line sharing and line splitting -- including when the ILEC does not provide the splitter -- there are two obvious analogs that should be used to establish the baseline requirements for an ILEC's support for line splitting: (1) the support an ILEC provides to itself or its data affiliate when it offers a combined voice/data package to end users[16] and (2) the support the ILEC provides to data CLECs that are engaged in line sharing. The requirements identified in Attachment 8 are firmly rooted in these and related legal principles, as explained in more detail below.

OSS-Related Operational Requirements (Sections I-IV)

Items I.A and I.B of Attachment 8 are necessary to establish an efficient OSS process to support non-facilities-based CLECs' access to the HFS portion of the loop needed to support DSL service.[17] As described in I.A, these requirements seek equal treatment with that offered to a data CLEC or the ILEC's data affiliate. The integration requirement in I.C simply echoes the Commission's consistent concern that electronic preordering and ordering systems must be capable of operating in an integrated manner, so as to avoid unnecessary service delays and problems both for the CLEC and end user customers.[18] Similarly, I.D and the latter portion of I.E. assure that the line splitting CLEC will receive HFS access that is equal in quality to that offered to other DSL providers.[19]

Items I.E through I.H are examples of unreasonable ILEC practices that have occurred in the past and must not be allowed to affect the provision of DSL service. The Commission should make clear that the statutory prohibition on unreasonable practices in both Sections 251(c)(3) and 201(b) forbids these and similar anticompetitive practices. The initial portion of I.E. forbids ILECs from requiring that CLECs request (and pay for)

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[14] Local Competition Order ¶ 312; see also id. ¶ 316.

[15] Id. ¶ 315.

[16] When an ILEC provides voice service and its data affiliate provides data service, the arrangement is defined as "line sharing" under the terms of the Line Sharing Order (at ¶ 17). When an ILEC provides both the voice and data services by itself, the arrangement is more properly defined as line splitting, because the ILEC cannot "share" a loop with itself. Line splitting by CLECs, however, may involve two carriers, one of which purchases the entire loop to provide voice service and the other of which provides data service pursuant to a commercial arrangement with the voice carrier.

[17] Local Competition Order ¶¶ 520-525; UNE Remand Order ¶¶ 425-426.

[18] Application by BellSouth Corporation, *et al.*, For Provision of In-Region, InterLATA Services in Louisiana, ("BellSouth Second Louisiana Order"), 13 FCC Rcd 20599, 20661-20667 ¶¶ 96-103 (1998); Application by BellSouth Corporation, *et al.*, Pursuant to Section 271 of the Communications Act of 1934, as Amended, To Provide In-Region, InterLATA Services in South Carolina, ("BellSouth South Carolina Order"), 13 FCC Rcd 539, 623-629 ¶¶ 155-166 (1997).

[19] 47 USC 251(c)(2)(C).

loop qualification information in all cases. There are many situations in which such loop qualification is unnecessary, e.g., when the customer already is receiving data service over its existing loop.[20] Thus, a mandatory loop qualification requirement would be unreasonable. Likewise, I.F precludes ILECs from requiring CLECs to re-submit information that is already in the ILEC's possession, an unreasonable practice that not only increases CLEC costs but creates significant opportunities for errors and provisioning delays.

Item I.G is needed to prevent ILECs from claiming that the loop-collocation-switch port configuration must be treated as a "designed" service, which typically takes longer to implement and may involve engineering and equipment that is generally not required for POTS (i.e., non-designed service). In fact, this exact service configuration is used to support line sharing (in all its forms) and line splitting when the ILEC splits the line for itself. Thus, it clearly requires no special design work. Finally, I.H is necessary to assure that ILECs cannot create unreasonable roadblocks to line splitting when there are two CLECs involved. A UNE-P CLEC must purchase an entire loop in order to provide voice service to the end user. However, in many cases, that CLEC will not have the necessary facilities in place to enable it to provide DSL services to its end users without obtaining certain capabilities from others. For example, the voice CLEC may well be able to reach a commercial arrangement with a data carrier to use the latter's facilities to provide DSL service over the HFS of its customer's loop. In those situations, the data carrier will own the splitter and be performing the work necessary to split the loop in its collocation. Accordingly, it is appropriate that the data carrier place the orders to reconfigure the customer's service arrangements with the ILEC. As long as the voice CLEC (the owner of the loop) has authorized the data CLEC to place such orders on its behalf (for example, by allowing the data CLEC to use its AECN), the ILEC should not be permitted to reject such orders simply because they come from a different source. Indeed, CLECs frequently use multiple AECNs, among other things, to allow for invoicing in a specific manner. Thus, ILECs should readily be able to accommodate such an approach.

Item II addresses the need to assure that ILECs provide nondiscriminatory treatment with respect to the maintenance and repair ("M&R") of voice services on UNE loops that must pass through CLEC splitters. The ILEC provides similar support to its own voice customers when it shares (or splits) a loop with itself or shares the loop with a data carrier. Moreover, M&R activities for the voice service are performed with an orientation to the telephone number of the voice service. UNE-P carriers who are forced into similar arrangements are entitled to the same treatment, without wholesale change to the maintenance procedures and interfaces, provided they arrange for the use of splitters that are compatible with industry standards. Indeed, it would be anticompetitive in the extreme if ILECs could, on the one hand, force CLECs to provide splitters to access HFS and, on the other hand, refuse to provide the CLECs' end users with nondiscriminatory M&R support, simply because the ILEC has refused to insert the splitter into the loop.

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[20] See Line Sharing Order ¶ 87.

The Commission has long recognized that an ILEC's performance of its basic OSS obligations cannot be reviewed in the absence of "clear and precise performance measurements" that tracks and measures its progress.[21] Items III.A-C set out basic requirements needed to perform such measurements. Since ILECs have (presumably) implemented performance plans to track their performance for line sharing with data CLECs, these requirements should be uncontroversial. III.A simply requires the development of an indicator that will enable ILECs to track their performance of HFS-related functions when a UNE-P carrier requests line splitting. This is a standard OSS requirement needed to provide appropriate disaggregation, so that valid performance comparisons can be made.[22] III.B lists the type of performance that must be tracked and measured. With only one exception (retail customer voice service interruption, which is obviously vital and directly comparable to measurements used for loop hot cuts), all of the other measures were recently supported by SBC in an ex parte filing made on July 13, 2000.[23] III.C merely requires the ILEC to provide comparative data that should be available as a result of the ILEC's implementation of its line sharing obligations and are necessary to compare against its performance in support of line splitting. Finally, III.D would place the burden on the ILEC to implement any changes to its OSS to support line splitting (which should be very minor) promptly.

Items IV.A through IV.G set forth UNE-P CLECs' operational billing needs associated with line splitting.[24] These are necessary to assure that (a) CLECs have the information they need to bill for both voice and data services; (b) the data will be delivered in a usable manner without the need for additional systems development; and (c) ILECs will cooperate in assuring that elements used to support data services will be billed to the appropriate CLEC.

Collocation-Related Requirements (Section V)

Items V.A through V.E are necessary to support the provisioning of this form of line splitting when the facilities used to provide the DSL service are operated by a carrier other than the UNE-P CLEC (see discussion of I.H above). In such cases, the two CLECs will be operating under a negotiated commercial arrangement that may involve, for example, shared use of the data CLEC's equipment, collocation space, terminating

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21 Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, To Provide In-Region, InterLATA Services in Michigan, 12 FCC Rcd 20543, 20655-20656, ¶ 209 (1997) ("[c]lear and precise performance measurements are critical to ensuring that competing carriers are receiving the quality of access to which they are entitled").

22 See, e.g., BellSouth Second Louisiana Order, ¶ 111; BellSouth South Carolina Order, ¶¶ 101, 102 & n.306.

23 Ex Parte Letter from Austin Schlick, counsel for SBC Communications, Inc. to Lawrence Strickling, Chief, Common Carrier Bureau, Federal Communications Commission, Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corporation to SBC Communications, Inc., CC Docket No. 98-141, ASD File No. 99-49, dated July 13, 2000.

24 See Local Competition Order ¶¶ 316, 525; UNE Remand Order ¶ 425.

frames and/or inter-frame connecting facilities. As a result, the CLECs need assurance that the ILEC will not obstruct their ability to implement such agreements.

Items V.A through V.C are directly supported by the Commission's Collocation Order, which expressly allows CLECs to share collocations.[25] V.A and V.B preclude the ILEC from impinging on the CLECs' sharing arrangements for physical collocation, as long as no additional ILEC work is needed to create and power the collocation space. V.C similarly requires ILECs to support shared virtual collocation arrangements, provided only that the initially collocating CLEC executes appropriate letters of authorization for the sharing CLEC.

Item V.D assures that ILECs will perform the in-office wiring necessary to support shared collocation arrangements used to provide voice and data services on a single loop. Since this is the same wiring used to support line sharing (or line splitting for the ILEC itself), it is clearly required by the nondiscrimination obligations of Section 251(c)(3). Finally, V.E prevents ILECs from using interlocutory legal challenges relating to collocations to disrupt existing shared collocation arrangements.

Pricing-Related Requirements (Section VI)

Items VI.A and VI.B assume that an ILEC is entitled to recover its costs for performing the cross-connect work necessary to implement line splitting. However, all charges for such work must be subject to the pricing requirements of Section 252(d)(1). Moreover, because the actual work done to support line splitting is identical to that used to support line sharing, the nondiscrimination obligation of Section 251(c)(3) requires that the ILEC meet a heavy burden to support any higher charges for line splitting. Moreover, the ILEC should not be allowed to delay the provisioning of line splitting pending resolution of any pricing disputes.

Other Requirements

Items VII.A and VII.B are rooted in the principles of Rule 51.315(b), which prohibits an ILEC from separating network elements that it currently combines. These requirements also facilitate line splitting that involves two cooperating CLECs. Both involve situations in which there is no need to change any of the facilities arrangements serving the customer, because the CLECs will use those identical facilities to provide service to the end user. In such cases, the ILEC should be required to implement such requests through records-only changes, and those changes should be implemented expeditiously and inexpensively, and without service disruption. Finally, VII.C simply restates the Commission's long-held view that ILECs may not insist that CLECs employ collocation to connect unbundled network elements if no additional functionality will be added in the collocation.[26]

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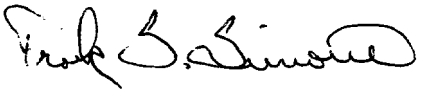
[25] Deployment of Wireline Services Offering Advanced Telecommunications Capability, First Report and Order, 14 FCC 4761, 4784 ¶ 41 (1999).

[26] BellSouth Second Louisiana Order, ¶¶ 168-170.

In sum, on the basis of the material in Attachments 1-7, AT&T requests that the Commission require ILECs to cooperate fully in enabling UNE-P CLECs to provide voice and data services over a single loop as swiftly, seamlessly, reliably, and economically as when an ILEC an its affiliate provide voice and data services, or when an ILEC provides voice services and a data-only CLEC provides advanced services. To best do so, the Commission should require ILECs to supply splitters on a line-at-a-time basis in a commercially reasonable manner. Moreover, to the extent that UNE-P CLECs obtain line splitting through the use of non-ILEC splitters, the Commission should make it clear that ILECs must comply with the operational requirements described in Attachment 8.

An original and two copies of this letter are being submitted pursuant to Section 1.1206 (b) of the Commission's rules. Please insert one copy into the public record of CC Docket Nos. 96-98 and 98-147.

Very truly yours,



Frank S. Simone

Attachments

cc: M. Carey
J. Carr
M. Egler
J. Jennings
J. Nuechterlein
J. Rosenworcel
J. Stanley

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ATTACHMENT 1

EX PARTE OR LATE FILED ORIGINAL

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June 7, 2000

JUN - 7 2000

Ex Parte Submission

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Re: CC Docket No. 00-65, Application of SBC Communications Inc., *et al.*, for Provision of In-region InterLATA Services in Texas

Dear Ms. Salas:

In response to the supplemental reply comments and affidavits of SBC Communications, Inc., et al. ("SBC"), and at the request of Commission staff, AT&T Corp ("AT&T") respectfully submits this letter, as well as the attached declaration[s] of C. Michael Pfau and Julie S. Chambers ("Pfau/Chambers Decl."), concerning SBC's newly explained change of position with respect to UNE-platform ("UNE-P") carriers and DSL.[1]

[1] These submissions would not have been necessary at this stage had SBC complied with the Commission's "complete when filed" and other rules designed to ensure the creation of a complete record as early in the process as possible. But SBC has repeatedly violated those rules with respect to the xDSL/UNE-P issue. Although AT&T had raised this issue in Texas last fall, SBC did not address it in its initial application despite its obligation to do so. AT&T emphasized this issue in its comments on SBC's first application, but SBC attempted to deflect the Commission's attention from it by proclaiming that "AT&T is free to offer both voice and data service over the UNE Platform." SBC Reply Br. 37 n.19. When SBC refiled its application, SBC attached evidence that it had either abandoned or never intended to abide by this representation, see Auinbauh Supp. Decl. Att. C, but nowhere acknowledged or explained its change of position. Instead, SBC waited until the second round of reply comments to address the issue on the merits, and even then its belated comments raise more questions than they answer, as explained in the accompanying declaration. SBC apparently believes that its "hide the pea" strategy will prevent the Commission from addressing AT&T's claims in this proceeding. If that is so, the consequence should be rejection of SBC's application.

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List A B C D E

Since the fall of 1999, SBC has refused to negotiate reasonable terms, conditions, and operating procedures to permit UNE-P carriers to provide both voice and data services over unbundled loops obtained as part of the UNE-platform. AT&T therefore pointed to SBC's intransigence as a principal ground for denying SBC's first Texas 271 application. See AT&T Comments at 9-27.

Indeed, SBC's attempt to block the use of UNE-P in conjunction with DSL service is merely the latest step in SBC's longstanding resistance to all forms of competition based on the UNE-platform. Thus, as AT&T also described in opposing SBC's first application, SBC initially raised a series of broad legal objections to UNE-P and attempted to impose numerous "poison pills" into interconnection agreements that would have restricted or entirely foreclosed competitors' use of UNE-P. See Tonge/Rutan Decl. ¶¶ 30-35. During the time that the FCC's Rule 315(b) was vacated, SBC flatly refused to provide UNE-P, and insisted that CLECs obtain access to combinations of UNEs exclusively through a collocation-based method that was patently discriminatory and in essentials is no different than what SBC is now trying to impose on CLECs seeking to add DSL to UNE-P. And when its legal objections were rejected, SBC proceeded to raise numerous technical and operational obstacles to CLECs' use of UNE-P which delayed and decreased CLECs' ability to rely on UNE-P to attract or retain customers. See Tonge/Rutan Decl. ¶¶ 36-53.

In connection with this application, SBC has further obstructed the use of UNE-P by asserting inconsistent positions on the use of UNE-P with DSL. Thus, in its initial 271 reply comments, SBC accepted, for the first time, its obligation to permit UNE-P carriers the ability to offer DSL services over the unbundled loops they obtain as part of the platform. Specifically, SBC stated that "*AT&T is free to offer both voice and data service* ***over the UNE Platform*** or other UNE arrangements, whether by itself or with its xDSL partner, I[P] Communications." SBC Reply Br. at 37 n.19 (emphasis added).

But SBC's conduct outside of the Commission's proceeding reflected precisely the opposite position. SBC submitted a proposed amendment to the T2A stating that the high frequency portion of the loop needed for data services "is not available in conjunction with a combination of network elements known as the platform or UNE-P . . . or any arrangement where SBC is not the retail POTS provider."[2] SBC waited until its supplemental reply comments, however, to acknowledge and defend its new position. In those comments, SBC states categorically that it will refuse to provision one simple piece of equipment – the "splitter" – needed to enable CLECs to add data service to the voice service provided over the UNE-platform, even though it is willing to provide that equipment to data carriers. Instead, SBC now asserts that "the *UNE-P carrier must request that* ***the platform be disconnected*** and then must order a DSL-capable loop and, if desired, UNE switching[,] and combine those elements with its collocated additional equipment (e.g., a splitter and a DSLAM)" in order to provide both voice

[2] T2A section 4.7.4, submitted as Att. C to the Supplemental Affidavit of Michael Auinbauh.

and data service to a customer. Auinbauh Supp. Reply Aff. ¶ 12 (emphasis added). SBC thus seeks to require CLECs to (1) dismantle the customer's existing arrangements that connect the customer's loop to the switch, (2) reroute the customer's voice circuit through the CLEC collocation space, and (3) then take that circuit back to SBC's switch. Such competition-defeating re-arrangements are required only because SBC refuses to place a splitter on the customer's existing line.

There is absolutely no technical or legal justification for SBC's "disconnect UNE-P" requirement. Indeed, SBC willingly *provides* a splitter for those data CLECs who are content to let SBC provide the customer with voice service. SBC's requirement is thus purely a policy decision that is applicable *only* when a CLEC attempts to provide *both* voice and data in competition with SBC. Accordingly, there is no legitimate business reason for SBC to refuse to provide the splitter to these CLECs, for the only explanation is that SBC is seeking to undermine the platform and prevent or impair CLECs from providing competition to SBC's voice services for customers using both voice and data. This refusal to deal with CLECs would constitute monopolization in violation of the Sherman Act if §§ 251(c)(3) and 271(c)(ii)(B) did not exist. See Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S 585 (1985). A *fortiori*, it violates the competitive checklist.

That is particularly so because SBC's policy position is not just starkly anticompetitive, but also will seriously constrain competition for both voice and data services in Texas. SBC's control over the local loop and unique ability to offer voice/DSL packages has already propelled it to a dominant market position, with 9 out of 10 DSL customers in Texas receiving service from SBC, and with projections of 300,000 customers by year end. SBC's policy of denying CLECs the ability to offer a competing voice/DSL package to residential customers using the UNE-platform will secure that dominant position indefinitely, because UNE-P is the only vehicle that AT&T and other CLECs currently have to offer voice service for residential customers on a scale that could provide meaningful competition with SBC and other ILECs. On its face, the alternative arrangement that SBC is imposing would greatly impair the ability of CLECs to offer a competing voice/data package; moreover, the full extent of the burden remains unknown because SBC has strategically withheld critical details of how it intends to implement this new "disconnect" requirement. By denying UNE-P to CLECs seeking to offer a package of voice and data services to residential customers, SBC will perpetuate its current monopoly for voice services to those customers – a large, growing, and economically very significant segment of the market – for the foreseeable future.

The remainder of this submission responds in more detail to SBC's attempted defense of its refusal to provide UNE-P CLECs with the reasonable and nondiscriminatory procedures they need, including the provision of loops with a splitter as part of the UNE-platform, so that they can provide residential customers with bundles of voice and DSL service in competition with SBC. Part I demonstrates that SBC's refusal to provide UNE-P CLECs with splitters, and with the procedures needed to implement access to loops that include splitters,

violates SBC's duty to make available the full features, functions, and capabilities of the loop. This follows from the plain language of the Commission's rules and prior orders. SBC offers no analytical or policy support for its contrary view, but invokes language from various Commission orders that neither addresses nor was intended to address the issue.

Part II further shows that SBC's failure to provide UNE-P CLECs with splitters, and with the procedures needed to implement access to loops that include splitters, is also flatly discriminatory, and therefore is grounds for denying SBC's application. SBC is denying UNE-P CLECs the arrangements needed to compete effectively with SBC, while at the same time offering data CLECs comparable arrangements so long as they do not attempt to offer voice service in competition with SBC. SBC provides no legally cognizable reason for refusing to provide splitters exclusively to those CLECs who seek to compete with SBC to provide packages of voice and data service.

Finally, Part III explains why, as a matter of administrative law, this Commission may not decline to resolve this matter in this adjudication, and why it is also imperative as a policy matter for the Commission to require SBC to provide UNE-P CLECs with the access they seek as soon as possible. As set forth below, failure promptly to require SBC to implement reasonable and nondiscriminatory procedures for UNE-P CLECs to offer bundles of voice and data service will irreparably harm both CLECs and the prospects for meaningful local residential competition in Texas.

I. SBC May Not Refuse To Provide The Splitter, Because The Splitter Is Part Of The Unbundled Loop Element

It is undisputed that it is technically feasible for SBC to condition UNE-P loops by adding a splitter so that a requesting UNE-P CLEC could use those loops to provide not only voice but data service as well. Accordingly, SBC is obligated by law to do so. As AT&T demonstrated in its supplemental comments (at 13-14), the Act (§§ 153(29), 251(c)(3), 251(d)(2)), and the Commission's rules and orders require incumbent LECs to provide CLECs access to "all" of the functions of an unbundled network element (47 C.F.R. § 51.307(c)), and to allow them to provide "any" telecommunications service that can be offered by means of that element. Id. See also Local Competition Order ¶ 382 ("some modification of incumbent LEC facilities" is required by § 251(c)(3)); New York Order ¶ 271 (ILEC "must also provide access to any functionality of the loop requested by a competing carrier unless it is not technically feasible"); UNE Remand Order ¶ 167; 47 C.F.R. § 51.309(a) (ILEC may not impose "limitations, restrictions, or requirements on requests for, or the use of unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends").

SBC nowhere even addresses, let alone attempts to refute, this authority. Instead, SBC both misrepresents its own prior statements as well as AT&T's positions,[3] and offers new arguments of its own that are either unsupported by any authority or rely solely on inapposite references to various Commission orders.

First, SBC invokes the UNE Remand Order and claims that splitters "do not meet the impair threshold required by section 251(d)(2) for unbundled access and are not unbundled elements." Auinbauh Supp. Reply ¶ 8; SBC Supp. Reply Br. 22. AT&T's position, however, is that the splitter is a part of the unbundled loop element that is subject to the unbundling requirement under prior Commission orders.Moreover, as Part II of this submission and AT&T's previously filed comments and affidavits make plain, CLECs would be severely impaired in their ability to provide both the voice and the data services that they seek to offer if the Commission were to adopt SBC's view that it may lawfully refuse to provide splitter-equipped loops with UNE-P. On this record, therefore, the Commission could properly conclude that the "impair standard" of section 271(d)(2)(B) is met with respect to a loop that includes a splitter.

Nevertheless, the Commission need not reach that impair analysis, because the incumbent LECs' obligation to provide a splitter as part of the unbundled loop is plainly established by the Commission's rules and prior orders. See, e.g., page 4, supra; AT&T Supp. Comments at 13-14. The splitter is properly considered part of the loop, moreover, because it plainly constitutes "attached electronics" necessary to provide CLECs the ability to take advantage of the full functions, features, and capabilities of the loop. See UNE Remand Order ¶ 167. Conversely, the splitter – particularly the stand-alone splitter (not integrated into a DSLAM) that AT&T seeks here – is not equipment "used for the provision of advanced services, such as a DSLAM." Id. Unlike a DSLAM, which is used exclusively for the provision of advanced services, a splitter is a passive piece of equipment that – like the loop itself – is necessary to enable a carrier to provide *both* voice and data services on the same loop. See

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[3] For example, SBC baldly misrepresents its prior written statement concerning its willingness to let AT&T add DSL to UNE-P. Compare SBC Supp. Reply Br. 22 ("As Southwestern Bell has previously explained, AT&T currently can offer both voice and data service, whether alone or in conjunction with another CLEC, *over a single unbundled loop*. See SWBT Reply Br. at 37 n.19") with SBC Reply Br. at 37 n.19 ("AT&T is free to offer both voice and data service *over the UNE Platform*") (both emphases added). SBC also wrongly implies that AT&T believes it "should not be responsible for ensuring that [its] loop is DSL-capable" (Auinbauh Supp. Reply Aff. ¶ 13), and that AT&T does not want to connect its UNE-P loops with its own, or a third party's, collocated DSLAM (id. ¶ 16). These unsupported assertions are incorrect, for AT&T has not objected to qualifying loops for DSL service nor to using its own (or a partner's) collocated DSLAMs. See Pfau/Chambers Decl. ¶ 5. AT&T's point is simply that there is no technical justification for requiring CLECs to disconnect the UNE-platform and reroute the voice circuit through collocated space. See also note 6, infra (misrepresentation concerning line sharing).

Pfau/Chambers Decl. ¶¶ 13-14.[4] This Commission has already concluded, in the context of the SBC/Ameritech Merger, that stand-alone voice splitters are not used exclusively to provide advanced services and may not even be transferred from SBC to ASI.[5] Accordingly, such splitters do not fall into the exception for advanced services equipment. Moreover, adding a splitter to a loop involves procedures that are analogous, in all relevant technical respects, to the adding or removing of other loop electronics (such as bridge taps or load coils) that incumbent LECs routinely provide and are obligated to provide as part of loop conditioning. See Pfau/Chambers Decl. ¶ 17. And adding a splitter is necessary to provide voice service when a customer also requests advanced data service over the same line, a configuration that is crucial to the development of a competitive market for advanced services, as the Commission found in the Line Sharing Order. For all these reasons, the splitter plainly falls within the definition of the loop element.

Second, SBC further attempts to evade its obligations to provide access to the full functions of the loop by claiming that it is not required "to do all of the work to reconfigure network elements that had been obtained as the so-called UNE platform into a new configuration which AT&T characterizes as line sharing on UNE-P."[6] Auinbauh Supp. Reply ¶ 13. In SBC's view, the FCC has "define[d] the platform as 'combinations of loop, switching and transport unbundled networks used to provide circuit-switched voice service,'" and this "definition" somehow relieves SBC of duties it otherwise would have to provision those same elements to CLECs to enable them to provide data as well as voice service. Id. (quoting Line Sharing Order ¶ 72 n.161).

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[4] Notably, the FCC has "define[d] packet switching as the routing of individual data units, or 'packets,' based on address or other routing information contained in the packets." UNE Remand Order ¶ 304. The DSLAM functionality is included in packet switching, because the DSLAM provides routing based on address information. Id. ¶¶ 303, 304. Conversely, the splitter performs no such "routing" function; it simply separates the signals it receives based on the frequencies of those signals, without regard to the content of the signals. See Line Sharing Order ¶ 66; Pfau/Chambers Decl. ¶ 13. This separating of signals is the essence of the splitter rather than the DSLAM. Thus, the Commission was careful to note that, although "DSLAM equipment sometimes includes a splitter," it need not, in which case "a separate splitter separates the voice and data traffic." UNE Remand Order ¶ 303.

[5] See SBC/Ameritech Merger Order ¶ 365 & n.682, App. C at ¶ 3(d).

[6] Of course, AT&T did not "characterize" its request in this way. At the very paragraphs SBC cites, AT&T used the phrase "line splitting," not "line sharing," (see Pfau/Chambers Supp. Decl. ¶¶ 40-41), and did so precisely to maintain the very distinction between AT&T's request and line sharing that AT&T emphasized throughout its supplemental comments. See, e.g., AT&T Supp. Comments 18 ("far from wanting to 'share' the line with SBC, AT&T wants the whole line to itself, voiceband and high frequency"). SBC's suggestion otherwise is at best sloppiness and at worst deliberate mischaracterization.

In the footnote relied upon by SBC, however, the Commission was merely referencing a prior, and entirely accurate, description of the UNE-platform. The fact that the UNE-platform has been used thus far "to provide circuit-switched service" does not preclude its use for providing other telecommunications services. To the contrary, this Commission's unbundling rule 309(a) specifically prohibits incumbent LECs from imposing "limitations, restrictions, or requirements on requests for, or the use of unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends." Indeed, the reason that the UNE-platform has thus far been used by CLECs solely for circuit-switched service is that SBC refuses to allow its use to provide any other service.

Third, SBC claims that incumbent LECs "are under no obligation to provide [the splitter]" to UNE-P CLECs because the FCC granted incumbent LECs "discretion" to retain control of the splitter when providing line-sharing to data-only LECs in the Line Sharing Order. SBC Reply at 22, citing Line Sharing Order ¶ 76. Paragraph 76 of the Line Sharing Order, however, cannot bear the weight SBC places upon it.

Nowhere in paragraph 76 does the Commission even mention, let alone purport to distinguish, the authority relied upon by AT&T concerning the incumbent LECs' duty to "modif[y]" their loop and other UNE facilities to enable requesting carriers to provide any telecommunications service they wish, including DSL. Local Competition Order ¶ 382. That is because the Line Sharing Order is directed at a separate issue. Paragraph 76 does not represent the Commission's attempt to define (or redefine) an incumbent LEC's obligations to respond to a UNE-P carrier's request for access to the full functionality of a loop to provide both voice and data service. Rather, paragraph 76 addresses an incumbent LEC's obligations with respect to a request for access solely to the high-frequency portion of the loop – which the Commission established as a separate network element in that Order. Indeed, that Order expressly acknowledged, and placed beyond dispute the fact that "requesting carriers could obtain combinations of network elements and use those elements to provide circuit-switched voice service as well as data services." Id. ¶ 47. Because paragraph 76 does not purport to address SBC's obligations outside the context of line-sharing, it does not and cannot rescind obligations that the statute and the Commission's prior rules and orders have separately imposed.

Moreover, by its own terms, paragraph 76 simply acquiesces in the request of incumbent LECs that they be allowed to "maintain control over the loop and splitter equipment" as against the claims of certain data CLECs who also argued "for the right to control the splitter" in the line sharing context. Line Sharing Order ¶ 76. Indeed, the Order goes on to emphasize that an incumbent LEC's ability to retain control over the splitter depends upon its willingness "to accommodate the competitive LEC's preferred technology"; the Order thus precludes incumbent LECs from exercising control over the splitter to deny CLECs the access arrangements they prefer. Id. ¶ 79; see id. ¶¶ 77-79. Thus, the Commission limited the discretion that it afforded incumbent LECs with respect to the splitter in the line-sharing context,

and that SBC now relies upon, precisely to ensure that incumbent LECs would not abuse that control in ways directly analogous to what SBC is attempting here. Thus, the Line Sharing Order not only fails to hold that incumbent LECs may refuse to provide CLECs with splitter-equipped loops outside the context of line sharing, it imposes limits on incumbent LEC discretion in the line-sharing context that are inconsistent with the position that SBC espouses here.

Finally, SBC argues that "no mandate" has been imposed that would require SBC "to conduct physical work and add equipment" such as a splitter to the elements of the platform "after those elements have been furnished to the CLEC." Auinbauh Supp. Reply ¶ 19. This assertion is unsupported by citation to any authority, and it is simply incorrect. A CLEC has a right to the full and exclusive use of the loop it purchases from the ILEC (47 C.F.R. § 51.309(c)), and is entitled to OSS functions (Local Competition Order ¶ 520; UNE Remand Order ¶¶ 425-426), loop conditioning (UNE Remand Order ¶¶ 172-173), and cross-connects (UNE Remand Order ¶¶ 178-179) to assure that it continues to receive nondiscriminatory access to UNEs and interconnection, as required by Section 251(c).

SBC cites to nothing in the language of the Act, or in the Commission's rules and orders, that even hints that an incumbent LEC's duty to permit access to the full functionality of network elements is limited to the initial provisioning of those elements.[7] Such a limitation, moreover, would be plainly discriminatory and anticompetitive, for it would deny CLECs the same ability that incumbent LECs have to use their network elements to meet customers' evolving service needs. It would mean, for example, that an incumbent LEC could refuse to process a request for a feature change for a CLEC's existing UNE-P customer, because the switching element for that customer had already been provisioned. SBC's unsupported attempt to discriminate against CLECs by denying them full use of unbundled network elements after they are initially provisioned thus lacks any merit.

[7] SBC's rhetorical suggestion, in a footnote, that AT&T does not "really" want access to the full functionality of the loop because it is willing to accept SBC's continued provision of DSL service when AT&T wins a UNE-P voice customer is absurd. It is obviously SBC, by refusing to allow AT&T to provide voice service in that context, that is restricting AT&T's ability to access all of the loop's functions and provide voice services to a customer that wants both voice and data service on his loop. See also Pfau/Chambers Decl. ¶ 22. Notably, SBC has yet to challenge on the merits AT&T's argument that SBC's refusal to provide its DSL service to customers for whom AT&T provides voice service over UNE-P is unjust, unreasonable, and unjustly and unreasonably discriminatory (in violation of § 201(b)) and an unreasonable restriction on the availability of a network element (in violation of § 251(c)).

II. SBC's Selective Refusal To Provide Splitters To UNE-P CLECs Is Discriminatory

SBC's proposal also blatantly discriminates against UNE-P CLECs. SBC is willing to provide splitters to data-only CLECs, who do not threaten SBC's voice monopoly or even compete with SBC in the provision of bundles of voice/data services. Auinbauh Supp. Reply Aff. ¶ 9. UNE-P CLECs, on the other hand, get no such choice. SBC requires them to provide their own splitter, regardless of whether that approach best suits their business plans. Id. ¶¶ 13, 19. This is stark discrimination. SBC's selective approach to providing the splitter makes it easier for data-only CLECs to offer data services than for AT&T do so, and easier for data-only CLECs to partner with SBC than with AT&T.

The anticompetitive consequences of SBC's discrimination are significant. Despite months of attempted negotiations, SBC has yet to provide AT&T or other UNE-P CLECs with procedures needed for a CLEC either (1) to order both UNE-P voice and DSL service for a new customer, or (2) to add DSL service for an existing UNE-P customer. Even in this filing, SBC continues to withhold basic and vital information about implementation and thereby denies commenters the ability to assess fully the implications of its requirements, while also failing to prove that its alternative is nondiscriminatory. Nevertheless, significant disadvantages are inherent in SBC's "disconnect UNE-P" approach. These disadvantages demonstrate that AT&T and other CLECs are severely impaired by SBC's failure to provide access to the procedures and the splitters needed to provision DSL over the UNE-platform. They also demonstrate that -- quite apart from SBC's failure to comply with its checklist obligations (§ 271(c)(2)(B)(ii), (iv)) -- SBC's selective denial of such access to UNE-P CLECs is classic anticompetitive discrimination that independently requires denial of SBC's application as inconsistent with the public interest (§ 271(d)(3)(C)).

First, to add DSL for an existing UNE-P customer, the CLEC is required "to disconnect its UNE-P arrangement and order an unbundled DSL-capable loop, and an unbundled switch port combined with shared transport to be connected to its collocation arrangement." Auinbauh Supp. Reply Aff. ¶ 15; see id. ¶ 17 (CLEC must "disconnect the UNE-P and obtain separate UNE elements (a UNE loop and a UNE switch port)."[8] The CLEC would then be responsible for "combin[ing]" the separately obtained UNE loop and UNE switch port with the splitter and DSLAM functionality in the CLEC's collocation cage. Id. ¶ 17.

This ripping apart of the customer's existing loop/switch port connection and forced re-routing through the CLEC's collocation cage is entirely unnecessary and enormously

[8] SBC nowhere refers to procedures for ordering both voice and data service for a new customer. For purposes of this submission, AT&T assumes that the process would involve essentially the same steps, with the initial step being the "disconnect" not of UNE-P but of the customer's existing voice connections with SBC, and continuing with the re-routing of the voice circuit through the CLEC collocation space and then back to the SBC voice switch.

anticompetitive. Pfau/Chambers Decl. ¶¶ 9-11, 25-26. For example, by introducing new and unnecessary cross-connects and demanding coordination between SBC and CLECs regarding circuit facility assignments, SBC's proposal would significantly increase the risk that CLEC customers would suffer a significant voice service outage as the cost of switching to CLEC voice/DSL service. Pfau/Chambers Decl. ¶ 28. SBC's approach also would dramatically raise the costs of UNE-P provisioning, by artificially creating a basis for SBC to seek to impose network assembly (glue) charges, cutover coordination charges, and other non-recurring charges that would not be needed if SBC provided the splitter. Id. ¶ 27. And SBC's apparent multiple-order requirement would, at a minimum, introduce numerous opportunities for OSS-related delays and disconnects, as past experience with UNE-P and UNE-L ordering has shown. Id. ¶ 28.

SBC's requirement would also create a powerful -- and entirely unnecessary -- incentive for data-only CLECs to partner with SBC rather than AT&T or other CLECs. Only SBC would be able to offer such data-only CLECs the benefits of a splitter that is owned, operated, and maintained by the same entity (i.e., the incumbent) that is responsible for the remainder of the loop. Pfau/Chambers Decl. ¶ 33. And if AT&T wished to provide voice service for a customer that received data service from a data-only CLEC and voice service from SBC, SBC's approach would require a hugely disruptive, cumbersome, and expensive rearrangement of cross-connections in the central office, when all that would be technically required is the electronic processing of a flow-through UNE-P order. Id. ¶ 25. Thus SBC's approach would doubly secure its position as the only carrier able to provide voice service to residential customers who want advanced services as well, just as its Chairman has boasted.

Of course, depending on the details of how SBC chose to implement this "disconnect" approach, the negative impact on CLECs could be far greater still. See id. ¶¶ 34. But even assuming that SBC attempted to minimize cost and disruption, SBC's insistence on disconnecting existing voice arrangements and re-routing them through CLEC collocation cages will doom any efforts by CLECs to use UNE-P to serve customers that also wish to obtain data service. Those customers may have a choice of data service provider (if line sharing is ultimately fairly implemented), but their only option for voice service will remain SBC.

As this Commission recognized in the UNE Remand Order, non-discriminatory access to the platform is essential if CLECs are to bring meaningful competition to the residential market. UNE Remand Order ¶¶ 253, 273, 296. By forcing CLECs to disconnect the platform in order to add data service, SBC is denying AT&T access to the principal vehicle for offering local service to residential customers. Pfau/Chambers ¶¶ 25-26. SBC's approach will thus perpetuate its monopoly position as the sole provider of local voice service for all of those customers that seek a package of voice and data services.

Indeed, the Commission already has already determined that a similar scheme with respect to UNE combinations used to provide voice services was unlawful, and required the

Commission to reject a BOC's section 271 application. See Second BellSouth Louisiana Order ¶¶ 161-70; BellSouth South Carolina Order ¶¶ 195-209.[9] Specifically, during the time that Rule 315(b) was vacated, BellSouth and other incumbent LECs, including SBC, refused to provide UNE-P for CLECs to provide competing voice services, and instead insisted upon disconnecting already combined network elements, and then requiring CLECs to obtain collocation space to recombine those elements. The Commission rejected two of BellSouth's section 271 applications because of that policy, "emphasiz[ing]" that "the use of combinations of network elements is an important entry strategy into the local telecommunications market" (BellSouth South Carolina Order ¶¶ 195-96) and that a BOC failed to comply with its obligations under section 251(c)(3) if it offer[ed] "collocation as the sole method for combining unbundled network elements." Second BellSouth Louisiana Order ¶¶ 168-70.[10] For these same reasons, SBC's "disconnect UNE-P" approach and its failure to establish and implement the detailed and reasonable procedures necessary to permit CLECs to use unbundled network elements to provide both voice and data services over a single line requires a finding that SBC, like BellSouth, has failed to prove that it has fully implemented the competitive checklist.

III. The Commission May Not Approve SBC's Application Without Resolving The Legal Issue Addressed Here

At bottom, the question presented here is one of law: whether SBC may – consistent with its duties to fully implement the competitive checklist and otherwise satisfy the requirements specified in § 271(d)(3) – refuse to provide CLECs access to the procedures and the splitters they need to provision DSL service with unbundled network elements, including UNE-P. The law is settled that the Commission may not "postpone" consideration of this or related legal issues (such as whether nondiscriminatory access to the full functions, features and

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[9] Application of BellSouth Corporation, et al. for Provision of In-Region, InterLATA Services in Louisiana, 13 FCC Rcd. 20599, ¶¶ 161-70 (1998) ("Second BellSouth Louisiana Order"); Memorandum Opinion and Order, Application of BellSouth Corp., et al. Pursuant to Section 271 to Provide In-Region, InterLATA Services in South Carolina, 13 FCC Rcd. 539, ¶¶ 195-209 (1997) ("BellSouth South Carolina Order").

[10] Notably, in both, the Commission found that the BOC must demonstrate, with specific "evidence of actual commercial usage" or testing, that its methods for providing access to UNE combinations were consistent with the Act and Commission's Rules. See id. ¶¶ 166-67; BellSouth South Carolina Order ¶¶ 197-98, 202-09. Just as SBC has refused to provide details regarding how it will provide access to combinations for providing voice and data services, BellSouth "fail[ed] to include definite terms and conditions" (id. ¶ 197) for access to UNE combinations and was deemed not to comply with the statute for that reason, as well as for its "refusal to heed the requirement" of showing, through actual commercial usage or thorough testing, that the procedures it offered were truly nondiscriminatory and could support meaningful competition. Second BellSouth Louisiana Order ¶ 166.

capabilities of the loop element requires access to loops equipped with splitters) on the ground that it intends to address the issue in "a rulemaking" or other subsequent proceeding. AT&T v. FCC, 978 F.2d 727, 729, 732 (D.C. Cir. 1992). Rather, where, as here, the Commission is acting as an "adjudicator" (determining a BOC's compliance with its statutory duties) rather than in the "quasi-legislative" role of "rulemaking," the Commission must reach a determination whether the BOC's conduct is in fact "violating the law." Id. at 732; see also MCI v. FCC, 10 F.3d 842, 846-47 (D.C. Cir. 1993) (same).

Indeed, the Commission's duty to decide such legal issues is especially clear in the context of a section 271 application. That is because the Act requires the Commission to make "a written determination" of whether, inter alia, the BOC has "fully implemented" the competitive checklist (thus leaving no possibility of approval for partial implementation) (§ 271(d)(3)(A)(i)), and also because the Act specifies that the Commission may not "limit or extend" the terms of the checklist (§ 271(d)(4)) or "forbear from applying the requirements of Section 251(c) or 271" (§161(d)). Thus, not only is there no principled line to be drawn between the legal issues that the Commission must resolve before approving a section 271 application and those it may defer to a later proceeding, but the statute also expressly precludes the Commission from attempting to draw any such lines.

There is also no valid procedural or policy reason for this Commission to defer resolution of these issues. This issue has been pending since the inception of SBC's application, and it is SBC that chose to delay joining issue.[11] The relevant issues are questions of law that can be readily resolved by consideration of this Commission's rules and prior orders. For the Commission to refuse to decide these issues now while simultaneously approving SBC's application as fully in compliance with all statutory duties is effectively to decide the issues in SBC's favor. Absent the incentive of § 271 relief, CLECs would have no effective means of enforcing SBC's obligation to provide CLECs the splitter and reasonable implementation procedures even if, in some future order, this Commission or a state commission were to require SBC to do so. Past experience with both Ameritech and SBC confirms that, in all likelihood, SBC would simply litigate incessantly the question of its obligation to provide the splitter, resist adoption of reasonable implementation procedures, and refuse to comply with interim orders to the contrary, at least until its last appeal was denied.

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[11] Resolution of this issue should certainly have been possible in the six months since SBC filed its initial application. Compare § 251(d)(1) (requiring release of the Local Competition Order and implementing regulations "[w]ithin 6 months after the date of enactment of the Telecommunications Act of 1996"). If there is any impediment to the Commission doing so, it is attributable solely to SBC's failure present its case until its most recent reply comments, and its continued refusal to respond in detail to AT&T's claims. If the Commission believes that it cannot resolve the issue on the current record in the time remaining, then it should deny SBC's application on that basis.

There is also no basis in this record to find that this issue can or will be promptly resolved at the state level. In this regard, SBC's statement that "the Texas PUC examined and addressed each of the complaints that CLECs have raised in their comments on SWBT's application" (SBC Reply Br. 9) is false. The TPUC has declined to address in state proceedings the issue of how UNE-P CLECs may get access to DSL, and has also made no mention of it in any of its filings before this Commission. In any event, reliance on the state commission to resolve this issue of federal law is inappropriate and necessarily will lead to extended delay.[12]

Finally, it is critical to the future of meaningful residential competition in Texas that this Commission reject SBC's position and insist, as grounds for obtaining 271 relief, that SBC provide CLECs with an equal opportunity to offer packages of voice and data service to residential customers. Today, nine out of 10 DSL customers in Texas receives that service from SBC. See Pfau/Chambers Decl. ¶ 42 . Moreover, the pace of SBC's market entry grows monthly, with SBC likely to be self-provisioning about 2700 DSL orders per business day by the end of this year, with a base by then of over 300,000 customers. Id. ¶ 41.

AT&T, by contrast, is currently unable to offer a package of voice and DSL service to even a single residential customer in Texas. And unlike SBC, AT&T cannot now project any growth – even to one customer – by the end of this year. This is not for want of effort. AT&T first sought to establish the necessary procedures to add DSL service to UNE-P last fall, shortly after SBC announced its plans to rapidly roll out its own residential voice/DSL service offering. Pfau/Chambers 1/31 Decl. ¶ 29. AT&T is in the process of establishing arrangements with data-only CLECs to provide the DSL portion of the service, and is making plans to roll out a combined voice/data service offer in several key Texas cities. And AT&T is moving aggressively to complete the work needed to offer a package of voice and data services over cable facilities, even though these facilities will allow AT&T to reach no more than about 20% of the Texas market. See Tonge/Rutan Decl. ¶ 17(a). But for now, that is as far as AT&T can go. AT&T cannot take the further steps needed to introduce a new service -- such as the development of operations support systems and market readiness testing -- unless and until SBC provides the necessary access to its network elements and defines in detail the procedures that CLECs can use to obtain that access and the cost of doing so. Id.

Any further delay in resolving this issue will thus provide SBC with an insuperable first-mover advantage that will foreclose meaningful residential voice competition

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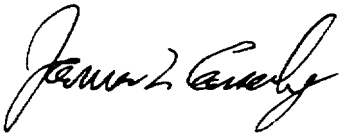
[12] In particular, SBC's scorched-earth approach to arbitration, the only vehicle that the TPUC has made available for AT&T to pursue its claim at the state level, ensures that this will not provide AT&T an effective means of relief in any time frame that would permit AT&T a meaningful opportunity to compete with SBC. For example, the TPUC's failure, more than one year after the Supreme Court's decision in Iowa Utilities Bd., to eliminate SBC's glue charges illustrates how long it can take to get relief through arbitration even after the Supreme Court has definitively resolved the outstanding federal law issue.

for customers who also want data service and seriously impair competition in the markets for data service and for long distance service as well. Indeed, such delay will effectively guarantee that SBC achieves its announced goal of using its unique control over the local loop to become the only carrier in Texas able to offer consumers the package of local, long distance, and advanced services they desire. Such a result – achieved while denying competitors a reasonable opportunity to compete – would render superfluous much of the accomplishments of the TPUC over the last three years and preclude in Texas, for the foreseeable future, fulfillment of the procompetitive promise of the Act.

An original and one copy of this letter are being submitted pursuant to Section 1.1206 (b) of the Commission's rules. Please insert one copy into the public record of CC-Docket No. 00-65.

Respectfully submitted,



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